No. 12854

United States
COURT OF APPEALS

for the Ninth Circuit

IN THE MATTER OF

WILLIAM B. MURRAY,

Appellant.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND 4-51

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JURISDICTIONAL STATEMENT

This contempt proceeding was prosecuted in a summary manner *sua sponte* by the Honorable James Alger Fee, Judge of the District Court of the United States for the District of Oregon (R. 29). The complaint charged

contempt of court by obstruction of the process of the court (R. 29). The Court ordered the appellant committed subject to appellant paying a sum of money to the United States Marshal, which appellant paid under compulsion (R. 30). The Judge accompanied his order dismissing the proceedings for contempt with a public reprimand in open court (R. 30, 31, 32).

Jurisdiction over contempts is conferred upon the District Courts of the United States by Title 18, U.S.C., Section 401, as follows:

> "A Court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority and none other, as . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

The United States Court of Appeals has jurisdiction to review the contempt proceeding of the United States District Court for the District of Oregon by virtue of Title 28, U.S.C., Section 1291, which provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

An order dismissing contempt proceedings for the punishment of an attorney, accompanied by a public reprimand in open court, is a "final order which can be reviewed on appeal by the United States Court of Appeals." *McCall Co. v. Bladworth, et al.,* 290 Fed. 365 (CCA 2, 1923).

STATEMENT OF THE CASE

Judgment on a promissory note was rendered against the defendant, Henry Gardner, in the case of Hall v. Gardner (R. 7, 19). On January 17, 1951, the United States District Court for the District of Oregon ordered the judgment debtor committed to jail until he should furnish $9,000 bail for his appearance (R. 15). Mr. Gardner asked his attorney, William B. Murray, to try to obtain a bail bond for him and handed Mr. Murray $200 with which to pay the premium (R. 27, 28). Mr. Murray and his associates were unable to obtain bail for Mr. Gardner. Since the money had been given to Mr. Murray for the specific purpose of paying for a bail bond, it was not applied on attorney's fees until Mr. Gardner signed an agreement specifically authorizing application of the $200 on account of attorney's fees (R. 28).

On January 22, 1951, Mr. Murray was suddenly proceeded against without notice by Judge Fee in a summary proceeding and found guilty of contempt of court for having accepted the $200 from his client for any purpose whatsoever (R. 31). The oral charge of contempt and appellant's request for time to prepare his answer, which was interrupted by the Court, and the sentence pronounced immediately by the Judge, all succeeded each other swiftly, as appears from the stenographic transcript in the Record, pages 29 to 30, reprinted as follows:

"The Court: The question you have to answer,

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*Marginal note supplied.

however, is the question of taking money from a man who was committed on an execution for the purpose of applying any property to the satisfaction of a judgment; in other words, obstruction of the process of the Court. That is what you have to answer, and that is what I will hear you on, if you want to say something about that.

Mr. Murray: May I ask the Court for time in which to answer that particular charge? At this time, I have had no—

The Court: All right, if you haven't anything to say on that subject, I will tell you what I am going to do about it.

I now order you committed to the custody of the United States Marshal and placed in his custody. I will place that order in effect at 6:00 o'clock tonight. If, in the meantime, you have placed the money that you took from the prisoner in the hands of the Marshal, then at any time I will hear you upon this other matter.

The appellant complied forthwith with the Court's order by turning over $200 to the United States Marshal (R. 30). Instead of hearing the motion which appellant was presenting in behalf of Mr. Gardner, the Judge immediately reprimanded the appellant as an attorney and officer of the court, saying:

"Now then, I am going to place the other implications of this matter in the hands of the Bar of this Court and am going to suggest that the Committee on Discipline of the Bar, appointed by this Court, examine the matter and see if there is any further implication." (R. 30)

Consideration of the motion being presented in behalf of Mr. Gardner was postponed (R. 30, 33). The Judge

*Marginal note supplied.

stated that he considered Mr. Murray's error in taking money from Mr. Gardner for any purpose whatsoever, in view of the commitment, a very serious matter (R. 31). He had taken it up as an emergency (R. 30).

William B. Murray appeals from the District Court's orders committing appellant to the custody of the United States Marshal subject to the condition that appellant pay to the Marshal the sum of $200, from the order referring the matter to the Committee on Discipline of the Bar appointed by the Court and from the public reprimand administered to the appellant by the Judge in open court.

This case presents the following questions:

First: When the Court ordered the appellant's client, a judgment debtor, "give bail in the sum of $9,000 for his appearance, and that in default thereof he be committed . . .",[1] was the appellant guilty of "disobedience" or "resistance" to the Court's "process" within the meaning of Title 18, U.S.C., Section 401(3), when he accepted $200 to use in assisting the judgment debtor to comply with the Court's order to give bail?

Second: Does the charge of contempt, as laid by the Judge, state facts sufficient to constitute contempt of court?

Third: Is there any substantial evidence in the record to support the Judge's charge of contempt?

Fourth: Was the appellant denied a substantial right by the Judge's failure or refusal to follow procedural requirements mandatory in a contempt proceeding?

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[1] Quoted from commitment in default of bail (R. 15).

SPECIFICATION OF ERRORS

FIRST: The charge of contempt as laid does not state facts sufficient to constitute contempt of court, and is not supported by any substantial evidence.

SECOND: The Court erred in finding the appellant guilty of contempt of court for doing what it was appellant's duty to do and what he had the right to do, i.e., accept $200 from his client for the purpose of assisting the judgment debtor to carry out the court's order to post bail for the debtor's appearance.

THIRD: The Court's error in failing to conduct the contempt proceeding in accordance with mandatory procedural requirements renders the orders appealed from invalid.

FOURTH: The District Court erred in ordering appellant committed to the custody of the United States Marshal, subject to the condition that the appellant pay to the Marshal the sum of $200.

FIFTH: The District Court erred in punishing the appellant by administering a public reprimand.

ARGUMENT

FIRST SPECIFICATION OF ERROR: The charge of contempt as laid does not state facts sufficient to constitute contempt of court, and is not supported by any substantial evidence.

Points and Authorities

(1) The District Court's power to punish for contempt is limited by Federal statute specifying what acts constitute contempt.

Title 18 U.S.C., Section 401.

Ex Parte Robinson, 19 Wall 505, 86 U.S. 505, 22 L. Ed. 205 (1873).

Morgan v. United States, 95 F. (2d) 830 (CCA 8, 1938).

Klein v. United States, 151 F. (2d) 286 (CA DC, 1945).

(2) In proceedings to enforce a judgment for the payment of money by writ of execution, a federal district court is bound to follow the law of the state in which the federal district court is held.

Title 28 U.S.C., Section 2007.
Rule 69(a), Federal Rules of Civil Procedure.
Oregon Constitution, Article 1, Sec. 19.

(3) Under the kinds of execution provided by Oregon statute, a commitment on execution does not authorize any levy upon the property of a judgment debtor.

Section 6-1101 O.C.L.A.
Section 6-1102 O.C.L.A.
Section 6-1107 O.C.L.A.

"Blackstone's Commentaries of the Law" edited by Bernard Gavit, (1941) Book 3, pages 719, 721, 723.

Dahms v. Sears, et al., 13 Or. 47, 11 P. 891 (1885).

(4) The evidence fails to support the charge. The judgment debtor was not "committed on an execution."

(5) If the judgment debtor was "committed on an execution", the evidence shows that the statutory requirements were not followed and therefore the proceeding based on a void execution was fatally defective and void.

Section 6-1107 O.C.L.A.

Section 7-302 O.C.L.A.

Norman v. Zieber, 3 Or. 197 (1870).

Klenoff v. Goodstein, 268 App. Div. 510, 51 N.Y.S. (2d) 919 (1944).

Cannon v. Haverty Furniture Co., 179 S.C. 1, 183 S.E. 469 (1935).

Stern v. Sullivan, 135 Me. 1, 188 A. 719 (1936).

The power to punish for contempt should not be employed arbitrarily or capriciously when no contempt has been committed. While it has been recognized from time immemorial that courts must necessarily possess power to make their authority respected, this "inherent" power to punish disobedience or disrespect is so susceptible to abuse that, in the United States, successive acts of Congress have restricted the contempt powers of the federal district courts within ever narrower limits. To decide what behavior constitutes contempt of court and renders a person punishable is not within the discretion of a United States District Judge; the power of the district courts to punish summarily for contempts is limited today by the statute specifying in what cases punishment for contempts may be inflicted. Title 18 U.S.C., Sec.

401, Appendix 1-A. An order punishing as a contempt conduct which is reprehensible and deserving of punishment, but which does not constitute contempt within the meaning of the statute, will be reversed. *Ex Parte Robinson,* 19 Wall 505, 86 U.S. 505, 22 L. Ed. 205 (1873); *Morgan v. United States,* 95 F. (2d) 830 (CCA 8, 1938); *Klein v. United States,* 151 F. (2d) 286 (CA DC, 1945).

The charge of contempt pronounced in open court is so brief that we reprint it here in full:

> "The question you have to answer, however, is the question of taking money from a man who was committed on an execution for the purpose of applying any property to the satisfaction of a judgment; in other words, obstruction of the process of the Court." (R. 29).

The only act charged, i.e., receiving money from a man "committed on an execution" is not unlawful and therefore is not an act of misfeasance sufficient to constitute contempt of court.

In proceedings to enforce a judgment for the payment of money by writ of execution, a federal district court is bound to follow the law of the state in which the federal district court is held. Since imprisonment for debt has been abolished in Oregon, the limitations, conditions and restrictions upon commitments by writ of execution provided by Oregon law apply to any writ of execution or process issued from the Federal District Court for Oregon. Title 28, U.S.C., Sec. 2007, Appendix 1-B; Rule 69(a), Federal Rules of Civil Procedure, Appendix 1-C; Oregon Constitution, Article I, Sec. 19, Appendix 2-A.

Three kinds of executions are provided by the Oregon laws: one against the property of the judgment debtor, another against his person, and the third for restitution of property. Sec. 6-1101, O.C.L.A., Appendix 2-B. Of these, the only one under which Henry Gardner could have been committed by the Judge is an execution against the person. Now execution against the person as limited by Oregon law, is not an execution against the property of the judgment debtor, and it authorizes no levy against his property. Execution against the debtor's person cannot issue until after the execution against his property is returned unsatisfied. Section 6-1107, O.C. L.A., Appendix 2-D.

A comparison of these statutory writs with the common law writs which they resemble may be helpful here. The execution against the property operates in rem against the goods and chattels of the judgment debtor and corresponds to the common law writ of *fieri facias*. Sec. 6-1102, O.C.L.A., Appendix 2-C; "Blackstone's Commentaries on the Law" edited by Bernard Gavit, (1941) Book 3, Page 721, Appendix 3-B.

The execution against the person under Oregon law resembles in some respects the common law writ of *capias ad satisfaciendum*. Both deprive the debtor of his liberty, and when a debtor is once taken in execution, no other process can be sued out against his lands or goods. Both operate in personam to coerce the debtor by imprisonment to pay voluntarily the judgment debt and he thus obtains his release. Section 6-1107, O.C. L.A., Appendix 2-D; "Blackstone's Commentaries on

the Law" edited by Bernard Gavit, (1941) Book 3, Page 719, Appendix 3-A.

Oregon law does not provide any writ of execution to correspond to the common law writ of *extendi facias,* which was an execution against both the body and the lands and the goods of the judgment debtor and operated both in personam and in rem. "Blackstone's Commentaries on the Law" edited by Bernard Gavit, (1941), Book 3, Page 723, Appendix 3-C.

The money taken by the sheriff from a person arrested on civil process is not subject to attachment or levy by virtue of any writ of execution. That doctrine was established in Oregon in 1885 by the case of *Dahms v. Sears,* 13 Or. 47, 11 P. 891 (1885), and it has never been departed from in this jurisdiction.

Inasmuch as no levy could be made against the debtor's property by virtue of an execution against his person, the "commitment on an execution" cannot and does not prohibit the judgment debtor from paying out his money for any purpose, nor does it prohibit anyone from receiving money from the judgment debtor. Therefore, the "commitment on execution for the purpose of applying property to the satisfaction of a judgment", referred to in the Court's charge, is not authorized under the Oregon statutes by an execution against the person. The Court may have had in mind something resembling the common law writ of *extendi facias,* which prevails today in some jurisdictions but not in Oregon.

Since the only writ upon which the judgment debtor could be "Committed on an execution" is not operative

against his property or money, taking money from the man could not be obstruction of such process, and therefore the accusation pronounced by the judge fails to state a charge in contempt.

Furthermore, there is no substantial evidence to support the charge as laid by the Judge. Leo McLean, United States Deputy Marshal, testified that Henry Gardner was placed in custody under an execution (R. 23); and that he was under arrest under an execution (R. 26). The process referred to in the charge was labeled by the Court as a commitment on execution (R. 29). The commitment on execution referred to in this case is in fact non-existent. The writ itself is the best evidence and should be conclusive on this issue of fact. Commitment in Default of Bail, which see (R. 15). If not conclusive, then appellant maintains that the commitment on execution is void.

Should the commitment be regarded as a commitment on an execution against the person, then the entire proceedings based thereon are fatally defective and void. *Norman v. Zieber,* 3 Or. 197 (1870); *Klenoff v. Goodstein,* 268 App. Div. 510, 51 N.Y.S. (2d) 919 (1944); *Cannon v. Haverty Furniture Co.,* 179 S.C. 1, 183 S.E. 469 (1935); *Stern v. Sullivan,* 135 Me. 1, 188 A. 719 (1936).

The statutory requirements of Sec. 6-1107, Appendix 2-D, and Sec. 7-302, O.C.L.A., governing commitment on execution, Appendix 2-E, were not strictly followed in that the execution against the property of the judgment debtor (printed at length R. 9, 10) was not returned unsatisfied prior to the commitment. The Docket

entries show that this execution (against the property of the judgment debtor) was issued to the marshal on January 16, 1951, and that the warrant of arrest issued to the marshal on the same day, and that commitment in default of bail was issued to the marshal on the day following, January 17th (R. 4, 5). The judgment creditor did not post the undertaking required for an execution against the person, nor did he deliver to the officer for service on the judgment debtor a copy of the writ upon which such execution should be based, nor was the judgment debtor served by the officer (R. 20).

The only proceedings in aid of execution initiated by the able counsel for the plaintiff-judgment creditor were proceedings permitted by statutes after the issuance of an execution against the property of the judgment debtor. They did not seek nor obtain an execution against the person of the judgment debtor. Nevertheless, the entire contempt proceedings were initiated by the Judge on the assumption that the debtor had been "committed on an execution" and that receiving money from a man so committed was reprehensible. The foregoing discussion should suffice as a demurrer to the Court's charge and to establish that the evidence fails to support the charge.

ARGUMENT

SECOND SPECIFICATION OF ERROR: The Court erred in finding the appellant guilty of contempt of court for doing what it was appellant's duty to do

and what he had the right to do, i.e., accept $200 from his client for the purpose of assisting the judgment debtor to carry out the court's order to post bail for the debtor's appearance.

Points and Authorities

(1) In the absence of an order restraining the arrested judgment debtor from spending the money in his pocket, the appellant had the right to receive such money for any purpose.

(2) What cash a judgment debtor has in his pocket is not exposed to execution.

Waples on Homestead and Execution, ch. 26, sec. 6, p. 834.

(3) Proceedings in the Federal District Court in aid of execution must conform to the Oregon statutes.

Rule 69(a) Federal Rules of Civil Procedure.

(4) When a judgment creditor elects to arrest the judgment debtor under Section 6-1704, O.C.L.A., he thereby renounces his right to proceed under Sections 6-1701, 1702, 1703, O.C.L.A.

Section 6-1701, O.C.L.A.
Section 6-1702, O.C.L.A.
Section 6-1703, O.C.L.A.
Section 6-1704, O.C.L.A.

(5) Although disobedience of court's order under Sections 6-1701, 1702, and 1703, O.C.L.A., may be punished as contempt, failure to give undertaking required under Section 6-1704, O.C.L.A., is not punishable by

contempt, because the court cannot simultaneously order an act and make that act punishable.

Section 6-1701, O.C.L.A.
Section 6-1702, O.C.L.A.
Section 6-1703, O.C.L.A.
Section 6-1704, O.C.L.A.

(6) The process by which the judgment debtor was held in jail was a commitment in default of his giving bail for his appearance, which process did not prohibit the debtor from paying, nor appellant from receiving money from the debtor.

(7) The federal court has no jurisdiction to punish as a contempt disobedience to an order which the court intended to make, but which in fact was never made.

Ex Parte Buskirk, 72 Fed. 14 (CCA 4, 1896).

(8) In this case there was no process nor order of the court nor statutory provision which would operate to place in custody of the law money on the person of the arrested judgment debtor.

(9) Money taken from an arrested judgment debtor by an officer or jailer is not subject to execution.

Commercial Exchange Bank v. McLeod, 65 Iowa 665, 19 N.W. 329 (1884).

Dahms v. Sears, et al., 13 Or. 47, 11 P. 891 (1885).

Emmanuel v. Sichofsky, 198 Cal. 713, 247 P. 205, 48 A.L.R. 580 (1926).

Coffee v. Haynes, 124 Cal. 561, 57 P. 482 (1899).

Before the appellant can properly be found guilty of contempt of court on a charge of "obstructing the

process of the court", he must first have committed some act of misfeasance or nonfeasance amounting to disobedience or resistance to some lawful writ, process, order, rule, decree or command of the court. Title 18 U.S.C., Sec. 401. Appendix 1-A. Appellant committed no act of disobedience or resistance to the process laid in the court's charge of contempt, nor did appellant disobey or resist any other process of the court whatsoever. The acts done by appellant as an attorney in behalf of his client are strictly within the rights of his client and himself and are in no way open to criticism from a professional standpoint.

In the absence of any order restraining the judgment debtor Henry Gardner from spending the money in his pocket as he might see fit, he had the right to pay, and the appellant had the right to receive, such money for any purpose whatsoever.

It is well established that what cash a judgment debtor has in his pocket is not exposed to execution. Waples on Homestead and Execution, ch. 26, sec. 6, p. 834. A lawful method whereby the judgment debtor may be required to take the money out of his pocket and apply it to the satisfaction of the judgment against him is provided by statute, but the statutory provisions must be complied with. When brought in the Federal District Court for the District of Oregon, proceedings supplementary to and in aid of an execution must conform to the Oregon state statutes in force. Rule 69(a) Federal Rules of Civil Procedure, Appendix 1-C.

When enforcing his rights under the applicable Ore-

gon statutes, a judgment creditor must elect to follow one of alternative and mutually exclusive statutory remedies allowed him. It is the judgment creditor's privilege to select under which code section he chooses to proceed, and the court cannot make the choice for him. The judgment creditor may either proceed under Sections 6-1701, 1702, 1703, O.C.L.A., Appendix 2-F, or in the alternative he may elect to have the judgment debtor arrested under Section 6-1704, O.C.L.A., Appendix 2-G. Under the first method, if it appears upon examination of the judgment debtor that he has property liable to execution, the court may order the debtor to apply that property in satisfaction of the judgment, and the creditor may obtain an order of the court restraining the debtor from disposing of his property liable to execution pending the proceeding. Disobedience of these orders may be punished as and for a contempt.

In the present instance, the judgment creditor elected to proceed under Section 6-1704, O.C.L.A. (R. 21, 11). Under this second method, if the judge is satisfied that the judgment debtor has property which he wrongfully refuses to apply to the judgment, the court may order the judgment debtor to enter into an undertaking that he will attend the court and during the pendency of the proceeding will not dispose of any portion of his property not exempt from execution. In default of such undertaking the debtor is committed to jail. Section 6-1704, O.C.L.A., Appendix 2-G. This section authorizes only an order to enter into the undertaking so conditioned. If proceeding under this section, the court can-

not enter an order restraining the disposal of the debtor's property, and the debtor's failure to furnish the undertaking is not punishable as a contempt.

On plaintiff's motion, the Court ordered the arrest of Henry Gardner under Section 6-1704, O.C.L.A., and the judgment debtor was brought before the court (R. 20). During the examination of the debtor, the Court, being of the opinion that a sufficient showing had been made with reference to the statute, stopped the examination and directed that debtor give an undertaking as required by the statute (R. 22). The debtor was then committed in default of bail for his appearance (R. 15, 16). The recitals and the commands to the marshal and jailer are reprinted as follows:

> "Whereas, Henry Gardner hath been arrested upon a Bench Warrant duly issued out of said Court, and hath this day been brought before said Court and is now in the custody thereof; and whereas, an order hath been duly made by said Court that said defendant give bail in the sum of Nine Thousand dollars, for his appearance, and that in default thereof he be committed to the County Jail of Multnomah County, Oregon, and whereas he hath not given bail as required by said order.
>
> "Now, This Is to Command You, the said Marshal or Deputy, to take and keep and safely deliver the said defendant into the custody of the Keeper or Warden in charge of said Jail forthwith.
>
> "And This Is to Command You, the said Keeper or Warden in charge of the said Jail, to receive from the said Marshal or Deputy the said defendant so committed as aforesaid, and him keep and imprison in accordance with said order till he shall give bail or till he be otherwise discharged by law. Hereof fail not at your peril."

Henry Gardner was held in jail by virtue of the process of the court and commitment above until he was released on January 26, 1951. This process holding Henry Gardner, the judgment debtor, in jail was not amended to conform to the order of the court filed January 25, purporting to have been signed eight days earlier (R. 17, 44). No other process issued and the commitment in default of bail was the process in effect when the appellant was tried for contempt of court on Monday, January 22 (R. 5, 29, 43). This commitment in default of bail does not by its terms prohibit the debtor from paying, nor the appellant from receiving money from the debtor, and there is no evidence of any obstruction of this process by the appellant.

If in the charge pronounced on January 22, accusing the appellant of obstructing process of the court, the Judge had in mind obstruction of the order filed on January 25, even so the appellant did only what it was his duty and right to do. Certainly is cannot be contempt for the client-judgment debtor to spend money in his pocket to purchase the undertaking which the court had ordered him to post as a condition to release from custody. It would be manifestly unjust to order a person to do a thing and at the same time to make compliance with the court's order punishable as contempt. That is undoubtedly the reason why alternative procedures are provided by the statutes. If it was not contempt for the debtor to spend his money for an undertaking, then it could not be contempt for the debtor's attorney to accept the money from his client for that purpose.

If, in pronouncing the charge of contempt, the Court had in mind that appellant had violated some order restraining the judgment debtor from disposing of his property not exempt from execution during the pendency of the proceeding, then the Court was laboring under a complete misapprehension. No such restraining order was in fact ever made in this case, nor would it be authorized by Section 6-1704, Appendix 2-G, under which the Court had announced the judgment creditor was proceeding (R. 21). As was pointed out in the case of *Ex Parte Buskirk,* 72 Fed. 14 (CCA 4, 1896), a federal court has no jurisdiction to punish as a contempt an act of disobedience to an order which the court intended to make, but which in fact was never made. Neither can the court make so punishable an act not forbidden by any order or decree at the time it was committed by afterwards entering an order forbidding such act.

If the Judge was attempting to vindicate the authority of the court outraged by some interference with property in *custodia legis,* then there must have been some reason why the money was in *custodia legis.* Although the person of an arrested judgment debtor is in custody of the law, the money in the prisoner's pocket is not in custody of the law until it is levied upon or seized by virtue of some process of the court, or unless operation of some Oregon statute should place that money constructively in custody of the court. None of the processes or orders discussed so far would operate to take into the custody of the law money on the person of the judgment debtor. No statute has come to our

attention which would operate under the facts of this case to place the debtor's money constructively in *custodia legis.*

Even when an arresting officer or jailer removes money from the person of a prisoner, that money should still be regarded as in the personal possession of the prisoner, and repeated cases have held application of such money by the sheriff to a writ of execution or attachment would be unlawful. *Commercial Exchange Bank v. McLeod,* 65 Iowa 665, 19 N.W. 329 (1884), *Dahms v. Sears, et al.,* 13 Or. 47, 11 P. 891 (1885); *Emmanuel v. Sichofsky,* 198 Cal. 713, 247 P. 205, 48 A.L.R. 580 (1926); *Coffee v. Haynes,* 124 Cal. 561, 57 P. 482 (1899).

In the Dahms case, which has been recognized as authority in Oregon since 1885, the court said, p. 56:

> "I am of the opinion that property taken from a prisoner . . . is not subject to attachment or levy by virtue of an execution. The security of the public may justify the searching of a prisoner confined in prison upon criminal or even civil process, and the taking from him of any property in his possession that would aid him to make an escape. It would probably be regarded, under such circumstances as a reasonable search and seizure; but to allow private parties to take advantage of the circumstances in order that they may secure a personal benefit would be a violation of that faith which the commonwealth owes to persons held in custody under its authority and laws. It would lead to oppression and abuse. The object and purpose of an arrest under civil and criminal process would be perverted and schemes and devices be resorted to by importunate creditors to enforce a

payment of their demands that would outrage justice and the right to personal security."

Similarly, in the Emmanuel case, the court said, p. 715:

> "From the authorities upon the subject it may be gathered as a general rule that, if money on the person of a prisoner when outside the prison walls is not subject to seizure, it is not subject to attachment or garnishment when it passes involuntarily from his possession to the custody of the officer appointed by law to take it into possession when such person enters as a prisoner within the walls. Public policy requires the adoption and maintenance of this rule. Were it otherwise it would lead to a grave abuse of criminal process. . . . It would tempt creditors whose *debtors keep their funds upon their persons, and thus beyond the reach of civil process,* to make unfounded criminal charges against their debtors and bring about their arrest and the transfer of their funds to the custody of the arresting officers, in order to make them reachable by the process of garnishment. It needs no citation of the cases to show that the general rule as thus broadly stated, is supported by the preponderance of authority. . . ."

ours

As was pointed out in *Coffee v. Haynes,* 124 Cal. 561, 57 P. 482 (p. 567):

> "The custody of the officer is not necessarily nor always the custody of the law."

ARGUMENT

THIRD SPECIFICATION OF ERROR: The Court's error in failing to conduct the contempt pro-

ceeding in accordance with mandatory procedural requirements renders the orders appealed from invalid.

Points and Authorities

(1) When the court proceeds *sua sponte* to vindicate the court's authority by prosecuting for contempt on charge of obstruction of process, the proceeding is for criminal contempt.

McCann v. New York Stock Exchange, 80 F. (2d) 211 (CCA 2, 1935).

(2) Failure to comply with the mandatory procedural requirements of Rule 42, Federal Rules of Criminal Procedure is reversible error.

Rule 42, Federal Rules of Criminal Procedure.

Western Fruit Growers, Inc. v. Gotfried, 136 F. (2d) 98 (CCA 9, 1943).

Duell v. Duell, 178 F. (2d) 683 (CA DC, 1949).

(3) Failure to notify appellant of the criminal nature of the proceedings until the trial was terminated was reversible error.

Western Fruit Growers, Inc. v. Gotfried, 136 F. (2d) 98 (CCA 9, 1943).

The character of the contempt proceeding under review, whether for civil or criminal, for direct or indirect contempt, determines what procedure the Court was bound to observe. By the criteria customarily considered in such matters, this was a criminal proceeding to punish an indirect contempt. It was brought *sua sponte*

and was conducted by the judge himself against a person not a party to the case giving rise to the act charged. The charge, "obstruction of the process of the Court" (R. 29), sounds in criminal, not civil contempt. The proceeding was not brought at the instance of a party to the principal case, and was not conducted by counsel for a party to that case. The orders pronounced by the Court (R. 29, 30) did not command the payment of any money to a party or his counsel as a remedial measure, but were punitive, calculated to vindicate the authority of the Court and to compel respect for its process. Judge Learned Hand reviewed the circumstances which indicate whether a contempt proceeding is to be regarded as civil or criminal. He pointed out in a scholarly opinion handed down in the case of *McCann v. New York Stock Exchange,* 80 F. (2d) 211 (CCA 2, 1935), that where the court proceeds *sua sponte,* without the assistance of any attorney, there can be little doubt that the proceeding is in criminal contempt. Certainly no judge would voluntarily take it upon himself to assume the place of counsel for a party and conduct civil contempt proceedings in behalf of an injured party to the cause, nor would he terminate civil contempt proceedings by the orders characteristic of a criminal proceeding.

To be valid, proceedings in criminal contempt must conform to the requirements of Rule 42, Federal Rules of Criminal Procedure, reprinted in Appendix 1-D. Rule 42(a) applies only to direct contempts, i.e., those committed in the actual presence of the court. Where, as in the case before us, contempt has not been committed in the presence of the court and evidence must be taken to

establish the contempt proceedings to punish, the indirect contempt must conform to Rule 42(b). The accused is entitled to notice of the criminal nature of the charge against him and the notice must state the essential facts constituting the criminal contempt. Furthermore, whether the notice is given orally by the judge in open court in the presence of the defendant, or by an order to show cause, or an order of arrest, the defendant must be allowed a reasonable time for the preparation of the defense. Rule 42(b) Federal Rules of Criminal Procedure, Appendix 1-D. Failure to comply with these procedural requirements is reversible error. *Western Fruit Growers, Inc. v. Gotfried,* 136 F. (2d) 98 (CCA 9, 1943); *Duell v. Duell,* 178 F. (2d) 683 (CA DC, 1949).

These mandatory procedural requirements of Rule 42(b) were completely ignored in the case before us. On Monday morning, January 22, 1951, when the appellant appeared in court in behalf of the arrested judgment debtor, he had no inkling that any contempt proceeding was in prospect. Leo McLean, United States Deputy Marshal, was called to testify concerning a sum of money found upon the judgment debtor when he was taken to jail (R. 24) and testified that he saw the debtor hand some money to his attorney and that he overheard a conversation about bail (R. 25). He testified further that the transaction with Mr. Murray occurred in the court room after the Judge had left the bench (R. 24). When the appellant took the witness stand, he was warned by the Court that anything he might say might be used against him (R. 27). During the course of this testimony, there was no suggestion that the Court was

trying the appellant for contempt of court. To the contrary, so far as the appellant knew, the evidence was offered and received upon the issues in the case of Hall v. Gardner.

Appellant presented a motion on behalf of his client and was utterly astonished to hear the Court reply by pronouncing a charge of contempt (R. 29). When the appellant asked for time to answer the charge, the Court neither allowed him time to prepare his defense, as required by Rule 42(b), nor did he allow him any hearing upon the charge then and there, but proceeded instantly to pronounce the sentence of contempt and punishment by reprimand (R. 29, 30).

In view of the Court's failure to state the charge against appellant, it cannot be contended that the testimony taken earlier was any hearing at all upon the contempt issue. Unless a defendant is apprised of the charge before testimony is taken, he has no opportunity to determine for what purpose the evidence is being offered and received nor what evidence may be material, competent or relevant to the unsuspected issues. Failure to notify a defendant of the criminal nature of the proceeding until the trial was in progress was held to be reversible error in the case of *Western Fruit Growers, Inc. v. Gotfried,* 136 F. (2d) 98 (CCA 9, 1943). In the case before us, the Court's abrupt procedure deprived the appellant of any opportunity to defend himself.

Conviction without a fair hearing is abhorrent to the fundamental principles of justice and cannot stand. Therefore, it is respectfully submitted that the irregu-

larities in procedure discussed above render invalid the Court's finding that appellant was guilty of contempt of court, and the orders based thereon should be set aside.

ARGUMENT

FOURTH SPECIFICATION OF ERROR: The District Court erred in ordering appellant committed to the custody of the United States Marshal, subject to the condition that the appellant pay to the Marshal the sum of $200.

Points and Authorities

(1) It is not within the jurisdiction of the Committee on Discipline of the Bar to review the Court's decision in any matter of law.

(2) Unless corrected by the appellate court, the erroneous interpretation of the doctrine of *custodia legis* enforced by the court below would be a dangerous precedent.

From the discussion of the merits of this case presented under the third specification of error, it should be clear that the transaction between the appellant and his client on January 17, 1951, did not involve any money held in *custodia legis*. Henry Gardner was entitled to pay the $200, and his attorney was entitled to accept the money. When the client subsequently signed an agreement authorizing application of the $200 on account of attorney's fees (R. 28), title to the money was transferred to appellant and his associates in the case.

Therefore, the effect of the order requiring appellant to pay $200 to the United States Marshal as a condition to release from custody was a conversion of appellant's money. The Court had no right to force the appellant, on pain of commitment, to hand over to the Marshal money which belonged to himself and his associates.

The appellant had committed no offense which would justify punishment by a fine, and there is nothing to indicate that the Court intended to levy one. The appellant was not ordered to pay the money to the Clerk of the Court, as would be customary if payment of the $200 was imposed as a fine. The Court appears rather to have viewed his command as an order of restitution of money taken wrongfully from the custody of the Marshal (R. 26). Accordingly, it is respectfully submitted that the erroneous order should be vacated and the United States Marshal instructed to return appellant's $200 to him taken from him by compulsion.

ARGUMENT

FIFTH SPECIFICATION OF ERROR: The District Court erred in punishing the appellant by administering a public reprimand.

Points and Authorities

(1) Where the acts done by an attorney on behalf of his client are strictly within the rights of his client and himself and in no way open to criticism from a pro-

fessional standpoint, it is error to reprimand him in any manner whatsoever.

McCall Co. v. Bladworth, 290 Fed. 365 (CCA 2, 1923).

In the case of *McCall Company v. Bladworth,* 290 F. 365, (CCA 2, 1923), an attorney appealed to the Court of Appeals for the Second Circuit from a reprimand unjustly administered at the close of a proceeding for contempt. In discussing that error, the appellate court said: "In contempt proceedings, the court has wide latitude in respect of punishment, but plainly no punishment can be administered unless the person upon whom it is attempted to visit the punishment has been found guilty of contempt." (p. 368). In the case at bar, it should be abundantly clear that any finding that appellant had been guilty of contempt was erroneous, both on the merits and as a procedural matter. Therefore, it is respectfully urged, the undeserved punishment should be countermanded. As the Court observed in *McCall Company v. Bladworth, supra,* "A member of the bar is properly sensitive of his reputation, and a lawyer with the proper conception of his duty to the court naturally feels keenly the effect of an undeserved reprimand." (p. 368). Its sting is lasting, and makes continuing repercussions upon the lawyer's practice, with consequent damage to his earning power.

Unlike punishment by imprisonment, which cannot be corrected by an appellate court once the sentence has been served, the effect of punishment by underserved reprimand can be counteracted by pronouncement from

the appellate court exonerating the appellant from blame.

The decision of the court below was predicated upon the assumption that from the moment a prisoner is placed in custody of the United States Marshal by the court, all funds on the prisoner's person are instantly transferred into custody of the law. Hence, before the prisoner can rightfully spend any of the money for any purpose whatsoever, he must obtain permission through the machinery of the court. Were the prisoner to spend any of his money without first going through this procedure, he and the person who should accept the money would be guilty of contempt of the court.

Under this new interpretation of the doctrine of *custodia legis,* which goes immeasurably further than any pronounced in the past, the prisoner would be required to obtain permission of the court before he had any right to employ or pay counsel, or to post bail, or, if we carry this idea to its logical conclusion, to purchase even a package of cigarettes.

Until corrected by the appellate court, the pronouncements of the United States District Court are authoritative and establish the rule in the district. It is not within the jurisdiction of the Committee on Discipline of the Bar appointed by the court to review the court's decision on any matter of law. Unless the United States Court of Appeals will correct the erroneous interpretation of the doctrine enforced by the court below, the case at bar will establish a precedent to justify similar violations of a prisoner's right to spend his own funds

in the future. For the guidance of the profession, the arresting officers and prisoners placed in custody, it is important that the United States Court of Appeals correct the errors committed by the Court in the present case and pronounce the proper interpretation to be given the doctrine of *custodia legis*.

Respectfully submitted,

WILLIAM B. MURRAY,
Attorney for Appellant.

APPENDIX 1-A

Title 18, U. S. Code, Section 401:

"Section 401. Power of court.—A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

"(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

"(2) Misbehavior of any of its officers in their official transactions;

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

APPENDIX 1-B

Title 28, U. S. Code, Section 2007:

"2007. Imprisonment for debt.—(a) A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished. All modifications, conditions, and restrictions upon such imprisonment provided by State law shall apply to any writ of execution or process issued from a court of the United States in accordance with the procedure applicable in such State.

"(b) Any person arrested or imprisoned in any State on a writ of execution or other process issued from any

court of the United States in a civil action shall have the same jail privileges and be governed by the same regulations as persons confined in like cases on process issued from the courts of such State. . . ."

APPENDIX 1-C

Rule 69(a), Federal Rules of Civil Procedure:

"69. Execution—(a) In general. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. . . ."

APPENDIX 1-D

Rule 42, Federal Rules of Criminal Procedure:

"Rule 42. Criminal contempt.—(a) Summary disposition.—A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

"(b) Disposition upon notice and hearing.—A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. . . ."

APPENDIX 2-A

Oregon Constitution, Article I, Section 19:

"§ 19. Imprisonment for debt: Fraud on part of debtor: Absconding. There shall be no imprisonment for debt except in case of fraud or absconding debtors."

APPENDIX 2-B

Section 6-1101, O.C.L.A.:

"§ 6-1101. Kinds of execution. There shall be three kinds of executions; one against the property of the judgment debtor, another against his person, and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same."

APPENDIX 2-C

Section 6-1102, O.C.L.A.:

"§ 6-1102. Issuance of the writ: Contents. The writ of execution shall be issued by the clerk and directed to the sheriff. It shall contain the name of the court, the names of the parties to the action, and the title thereof; it shall substantially describe the judgment, and if it be for money, shall state the amount actually due thereon, and shall require the sheriff substantially as follows:

"(1) If it be against the property of the judgment debtor, and the judgment directs particular property to be sold, it shall require the sheriff to sell such particular property and apply the proceeds as directed by the judgment; otherwise, it shall require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter;

" . . .

"(3) If it be against the person of the judgment debtor, it shall require the sheriff to arrest such debtor and commit him to the jail of the county until he shall pay the judgment, with interest, or be discharged according to law;

" . . . "

APPENDIX 2-D

Section 6-1107, O.C.L.A.:

"§ 6-1107. Execution against person of debtor. If the action be one in which the defendant might have been arrested, as provided by section 7-301, an execution against the person of the judgment debtor may be issued to any county within the state after the return of the execution against his property unsatisfied in whole or in part, as follows:

" . . .

"(2) When no such cause of arrest appears from the record such execution may issue for any of the causes prescribed in section 7-301, that may exist at the time of the application therefor, upon leave of the court or judge thereof;

" . . .

"(4) When execution is issued against the person of the defendant by leave of the court, it shall be applied for and allowed in the manner provided in section 7-302, for allowing a writ of arrest, except that the undertaking need not be for an amount exceeding the judgment. A defendant arrested on execution, who has not been arrested provisionally, may at any time be discharged from such arrest for the causes and in the manner provided in sections 7-323 and 7-324, for the discharge of a defendant who has been provisionally arrested."

Section 7-301, O.C.L.A.:

"§ 7-301. When defendant may be arrested. No per-

son shall be arrested in an action at law, except as provided in this section. The defendant may be arrested in the following cases:

"(1) In an action for the recovery of money or damages on a cause of action arising out of contract, when the defendant is not a resident of the state, or is about to remove therefrom, or when the action is for an injury to person or character, or for injuring or wrongfully taking, detaining, or converting property.

" . . .

" . . .

" . . .

"(5) When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

"But no female shall be arrested in any action, except for an injury to person, character, or property."

APPENDIX 2-E

Section 7-302, O.C.L.A.:

"§ 7-302. Proceeding to obtain arrest. The mode of proceeding to obtain the arrest of the defendant for any of the causes specified in section 7-301, shall be as provided in this section:

"(1) At any time after the commencement of an action at law, and before judgment, the plaintiff in such action shall be entitled to a writ of arrest for such defendant whenever he shall make and file with the clerk

of the court in which such action is commenced, or is at the time pending, an affidavit that the plaintiff has a sufficient cause of action therein, and that the case is one of those mentioned in section 7-301, and shall also make and file with such clerk an undertaking, with one or more sureties, in a sum not less than $100, and equal to the amount for which plaintiff prays judgment. Such undertaking shall be conditioned that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding the amount specified in the undertaking;

"(2) The affidavit may be either positive or upon information and belief; but, if the latter, it shall state the nature and sources of such information upon which the belief is founded. The plaintiff shall also file with his undertaking the affidavits of the sureties therein, from which it must appear that such sureties are residents of the state, and that they are, taken together, worth double the amount of the sum specified in the undertaking over all debts and liabilities and property exempt from execution. No person not qualified to become bail upon arrest is qualified to become surety in an undertaking for an arrest;

"(3) The writ of arrest shall be issued by the clerk, and shall require the sheriff of any county where the defendant may be found, forthwith to arrest him and to hold him to bail in the amount specified in the undertaking, and that in default thereof, to keep him in cus-

tody until discharged by law, and to return the writ to the clerk from whom it issued, with his doings indorsed thereon, when required by the plaintiff at any time before the defendant may be arrested, or afterwards whenever the defendant shall have been discharged from the arrest on bail or otherwise;

"(4) The plaintiff shall deliver or cause to be delivered to the sheriff, with the writ, a copy of the affidavit upon which the writ was issued, subscribed by himself or attorney. The sheriff, upon delivery of the writ, shall indorse thereon the date of the receipt, and upon the arrest of the defendant, shall deliver to him a copy of the writ, and such copy of the affidavit. The sheriff shall execute the writ by arresting the defendant and keeping him in custody, until discharged by law."

APPENDIX 2-F

Section 6-1701, O.C.L.A.:

"§ 6-1701. Proceedings to require debtor to appear. Place of appearance. After the issuing of an execution against property, and upon filing by the plaintiff, or some one on his behalf, of an affidavit stating in general terms that the plaintiff believes that the judgment debtor has property liable to execution which he refuses to apply toward the satisfaction of the judgment, such court or judge may, in its discretion, by an order, require the judgment debtor to appear and answer under oath concerning any property or interest in any property that he may have or claim, before such court or judge,

or before a referee appointed by such judge or court, at a time and place specified in the order. It shall not be necessary to specify any particular property in said affidavit, but a general averment shall be sufficient; provided, that no judgment debtor may be required to attend hereunder before a judge or referee out of the county in which he resides or may be found, at the time of the service of the order requiring his appearance, unless the place where the judgment debtor is to appear is not more than 20 miles from the residence of said judgment debtor."

Section 6-1702, O.C.L.A.:

"§ 6-1702. Examination of judgment debtor. On the appearance of the judgment debtor, he may be examined on oath concerning his property. His examination, if required by the plaintiff in the writ, shall be reduced to writing, and filed with the clerk by whom the execution was issued. Either party may examine witnesses in his behalf, and if by such examination it appear that the judgment debtor has any property liable to execution, the court or judge before whom the proceeding takes place, or to whom the report of the referee is made, shall make an order requiring the judgment debtor to apply the same in satisfaction of the judgment, or that such property be levied on, by execution, in the manner and with the effect as provided in this title, or both, as may seem most likely to effect the object of the proceeding."

Section 6-1703, O.C.L.A.:

"§ 6-1703. Restraining disposal of property: Punish-

ing disobedience of orders. At the time of allowing the order prescribed in section 6-1701, or at any time thereafter pending the proceeding, the court or judge may make an order restraining the judgment debtor from selling, transferring, or in any manner disposing of any of his property liable to execution, pending the proceeding. Disobedience to any order or requirement authorized by sections 6-1701, 6-1702 and 6-1703, on the part of the judgment debtor, may be punished as for a contempt."

APPENDIX 2-G

Section 6-1704, O.C.L.A.:

"§ 6-1704. Arrest of judgment debtor: Undertaking. Instead of the order requiring the attendance of the judgment debtor, as provided in the last two sections, the court or judge may, upon proof by affidavit of a party, or otherwise to his satisfaction, that there is danger of the debtor leaving the state, or concealing himself therein, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be to arrest him and bring him before the court or judge; upon being brought before the court or judge, he may be examined on oath, and if it then appear that there is danger of the debtor leaving the state, and that he has property which he has unjustly refused to apply to such judgment, he may be ordered to enter into an undertaking, with one or more

sureties, that he will from time to time attend before the court or judge, as may be directed, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to the jail of the county by warrant of the judge."

APPENDIX 3

Excerpts from "Blackstone's Commentaries on the law, edited by Bernard Gavit, (1941) Book 3.

Appendix 3-A, pp. 718-719, CAPIAS AD SATISFACIENDUM:

"*Its Intent.* The intent of it is to imprison the body of the debtor, till satisfaction be made for the debt, costs and damages. . . ."

"*Estops other Process.* This writ of *capias ad satisfaciendum* is an execution of the highest nature, inasmuch as it deprives a man of his liberty, till he makes the satisfaction awarded, and therefore when a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods. . . ."

"Language of the Writ. The writ is directed to the sheriff, commanding him to take the body of the defendant and have him at Westminster on a day therein named, to make the plaintiff satisfaction for his demand. And if he does not then make satisfaction, he must remain in custody, until he does."

Appendix 3-B, p. 721, FIERI FACIAS:

"*Form of Writ.* The sheriff is commanded, *quod fieri faciat de bonis,* that is, he cause to be made of the goods and chattels of the defendant the sum or debt recovered. . . ."

Appendix 3-C, p. 723, EXTENT, OR EXTENDI FACIAS:

"When Allowed: This writ issues upon some prosecutions given by statute, as in the case of recognizances for debt acknowledged on statutes merchant or staple; upon forfeiture of these, the body, lands and goods may be taken in execution, to compel the payment of the debt."